DICEY'S "CONFLICT OF LAWS."[1]

AT last we have an adequate treatise on a branch of the law the importance of which to an American lawyer is great and growing.

Some years ago Professor Dicey very successfully dealt with the subject of Domicil, using the rather common English form of rule, comment, and illustration. His work on Domicil is incorporated into this book, and the same method is adopted for treating the whole subject. He has done the work as well as it could be done. The subject perhaps lends itself to such treatment less successfully than evidence, for instance, or torts, because so many of its rules are not clearly determined, and are still subjects of controversy. Full discussion is needed, rather than dogmatic treatment. It is not yet time to formulate the rules governing foreign-acquired rights.

Passing over the form of treatment, however, Professor Dicey's book is highly satisfactory. He has succeeded in a few lines in stating the fundamental principles of his subject better than they have ever been stated before. "The courts, e. g. of England, never in strictness enforce foreign law; when they are said to do so, they enforce, not foreign laws, but rights acquired under foreign laws. . . . The rules as to extra-territorial effect of law enforced by our courts are part of the law of England."[2] He had already said, still more forcibly,[3] "The rules of so called private international law are based on the recognition of actually acquired rights, i. e. of rights which when acquired could be really enforced by the sovereign of the State where they have their origin."

Starting with these principles, Professor Dicey could write, and has written, the best book on the subject. His analysis and arrangement are strikingly novel, and commend themselves entirely; though one may perhaps be allowed to doubt the expediency of treating the great subject of jurisdiction of law under

[1] A Digest of the Law of England with Reference to the Conflict of Laws. By A. V. Dicey, Q. C., B. C. L. With Notes of American Cases, by John Bassett Moore. London: Stevens and Sons, and Sweet and Maxwell. Boston: The Boston Book Co.

[2] Pages 10, 11.

[3] 1 Law Quart. Rev., 284.

the rather provincial titles "Jurisdiction of the High Court," and "Jurisdiction of Foreign Courts." The book has, in great degree, the merits of completeness, clearness of arrangement, of thought, and of statement, and enlightened dealing with the authorities; and the crowning quality of a book on this branch of the common law, ability to keep clear of the Continental writers.

Professor Moore's American notes, while not complete collections of the authorities, sufficiently indicate the tendency of the American decisions. One may, however, regret that he has not dealt more fully with the difficult subject of Assignment for Benefit of Creditors.

One hesitates to express a dissent from the conclusions of so generally sound a thinker as Professor Dicey; but this seems a proper time to point out what seems an irrepressible conflict between his general principles and his rules relating to foreign contracts.

The rules on this subject as stated by Professor Dicey are in effect these: "'The proper law of a contract' means the law or laws by which the parties to a contract intended or may fairly be presumed to have intended the contract to be governed."[1] Generally "a person's capacity to enter into a contract is governed by the law of his domicil."[2] Generally "the formal validity of a contract is governed by the law of the country where the contract is made."[3] "The essential validity of a contract is [generally] governed indirectly by the proper law of the contract";[4] a contract being essentially valid when the law will give effect to it, that is, when it is not forbidden by the law, or made void or voidable by law, as (he says) is the case with a gratuitous promise.[5] "The interpretation of a contract and the rights and obligations under it of the parties thereto, are to be determined in accordance with the proper law of the contract."[6] "The validity of the discharge of a contract (otherwise than by bankruptcy) depends upon the proper law of the contract (?)."[7]

To these rules Professor Dicey is driven in his effort to rationalize English cases. Let us see whether they are consistent with his fundamental purpose stated above. The English courts, as has been said, enforce rights acquired under foreign laws. Indeed, Professor Holland has most aptly described the subject as

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[1] Rule 143. [2] Rule 146. [3] Rule 147. [4] Rule 148. [5] Page 554. [6] Rule 149. [7] Rule 150.

"the extra-territorial recognition of rights." If, therefore, a court is to enforce a contract, it must be because that contract has in some state created a legal right. The municipal law, as Professor Dicey rightly indicates (page 4), determines the legal effect of actions which are done within its jurisdiction. Now a contract gives rise to legal obligations, because in the place where the act of contract takes place a legal obligation is created by that act. When two men shake hands in Boston, the law of England is incapable of attaching any legal consequence to their act. There is no law of England where the act is done. The law of Massachusetts is there, ready, if it chooses, to give the act legal significance. If it does not choose, the act is incapable of having a legal significance. No right, in other words, can spring up on the soil of Massachusetts, unless it is created by the laws of Massachusetts. If, therefore, a contract, legally binding, is made in Massachusetts, the law of Massachusetts makes it binding. Now suppose that a contract in Massachusetts requires a consideration; that in Japan a contract does not require a consideration. Suppose two persons in Massachusetts make an agreement without consideration, to be performed in Japan, evidently intending that it shall be governed by the law of Japan, does any legal right arise out of the agreement? It would seem not. Massachusetts law attaches no legal liability to an agreement without consideration: therefore the agreement there made does not become legally binding anywhere. It was not legally binding by the law of Japan because nothing was done within the jurisdiction of Japanese law. Now if no legal right arose in Massachusetts, there is no principle of the Conflict of Laws by which a right could be recognized anywhere else in the world. This is only another way of saying that parties cannot by their own will change the law of the country in which they are. If, for illustration, two men in country A could have their acts judged by the laws of country B, they would have power of changing the law to which they are subject. It seems clear, therefore, on principle, that, whether a legally binding contract has been made can be judged only by the *lex loci contractus*.

By the same line of reasoning it will be seen that the capacity of the parties to make a contract must be judged by the *lex loci contractus*, not by the *lex domicilii*. Suppose a boy of ten, domiciled in a country where he is of age, attempts to make a contract in London, will the law of England annex a legal obligation to his

act? Clearly not. "It is a solecism to speak of that transaction as a contract which cannot be a contract because of the inability of the persons to make it such."[1]

The legal effect of a contract, and all matters pertaining to its performance or discharge, and to damages for its breach, should evidently be judged by the law of the country in which they are respectively to take place; that is, by the *lex loci solvendi.* If, for instance, protest of a bill is to be made in France, the law of that country alone can judge whether it has been duly made, for that law alone is present where it is made.

This leaves for Professor Dicey's universal actor, the "proper law of the contract," that is, the law by which the parties intended to be governed, a very subordinate *rôle.* The intention of the parties, as judged from their acts, here as elsewhere governs the interpretation of the contract, and that alone. If there is doubt as to the legal meaning of language, reference should be had to the law which appears to have been in the minds of the parties.

So much for principle; now let us see which view is supported by authority.

1. Capacity of Parties. Until 1878 the English decisions were all, in accordance with principle, to the effect that capacity to contract was determined by the *lex loci contractus.* In that year the Court of Appeal reversed the judgment of the Probate Division in a matrimonial cause, and in the course of his opinion Cotton, L. J. (for the court) said *obiter*: "It is a well recognized principle of law that the question of personal incapacity to enter into any contract is to be decided by the law of domicil. . . . As in other contracts, so in that of marriage, personal capacity must depend on the law of domicil."[2] No authority was cited (none but that of Continental writers could have been cited) in support of this statement, and the point had not been argued by counsel. Sir James Hannen, at a later stage of the same case, commented thus on the *dictum*: "I trust that I may be permitted without disrespect to say that the doctrine thus laid down has not hitherto been 'well recognized.' On the contrary, it appears to me to be a novel principle, for which up to the present time there has been no English authority. What authority there is seems to me to be the

[1] Wallace, J., in Campbell *v.* Crampton, 2 Fed. Rep. 417, 423.
[2] Sottomayer *v.* De Barros, 3 P. D. 1.

other way.[1] . . . If the English reports do not furnish more authority on the point, it may perhaps be referred to its not having been questioned.[2] He points out that marriage may differ in this respect from ordinary contracts. Mr. Justice Sterling in a later case[3] "conceived" that he was "bound by" the *dictum* of the Lord Justice; and Professor Dicey holds the same view. Why a dictum of Lord Justice Cotton should so completely outweigh a dictum of Sir James Hannen, supported by several earlier decisions, is not plain to an American lawyer.

In America the decisions are unanimous in favor of the *lex loci contractus*, though Professor Moore's cautious American note on the passage might not lead one to suppose so.[4]

2. Making of the Contract. It is agreed by all that the formalities required by the place of contract must be complied with; but there is great confusion in the cases as to the rule governing the sufficiency and validity of the consideration, and the legality of the agreement. Several views have been maintained. One view is doubtless that expressed by Professor Dicey, that these matters are governed by that law which the parties intended to govern them. Most of the cases cited by him do not support his contention, but there are no doubt *dicta* to that effect in some of the affreightment cases.[5] The case, however, on which he most relies, Hamlyn *v.* Talisker Distillery,[6] is not a case where the creation, but the effect of a contract, was in question. The arbitration clause, as to which the question in the case arose, was part of an English contract, and was performable in England; its legality as an agreement could not have been successfully attacked, nor was the attempt made. Suit was not brought on this agreement in Scotland; it was set up by the defendant in bar of the action, and the question was whether its effect was to oust the Scotch court of jurisdiction. The plaintiff claimed that the "proper law of the contract" was Scotch, and that the court was not ousted; the

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[1] Citing Male *v.* Roberts, 3 Esp. 163; Scrimshire *v.* Scrimshire, 2 Consis. 412; Simonin *v.* Mallac, 2 Sw. & Tr. 77; 1 Burge, Colon. Law, 132; Story, Confl. L., § 103.

[2] 5 P. D. 94, 96.

[3] *In re* Cooke's Trusts, 56 L. J. Ch. 637, 639.

[4] Saul *v.* His Creditors, 17 Mart. 569, 597; Thompson *v.* Ketcham, 8 Johns. 190; Milliken *v.* Pratt, 125 Mass. 374; Wright *v.* Remington, 41 N. J. L. 58; Swank *v.* Hufnagle, 111 Ind. 453; Baum *v.* Birchall, 150 Pa. 164; Campbell *v.* Crampton, 2 Fed. Rep. 417.

[5] See *In re* Missouri Steamship Co., 42 Ch. D. 321.

[6] [1894] A. C. 202. See this case discussed, 9 HARVARD LAW REVIEW, 371.

House of Lords decided, as it must, that the effect of the clause was to be determined by the law of England, where it was agreed that the arbitration should take place. Lord Watson called it a question of interpretation, to be determined according to the intention of the parties;[1] Lord Herschell treated it as a question of the right created.[2] The case is therefore no authority on the point under discussion.

A second view is that taken by the Supreme Court of the United States, first suggested in usury cases, — that though the contract would be void for usury where made, it would yet be supported if valid where it was to be performed. The choice of law was, however, limited, the contract must be valid either by the *lex loci contractus* or by the law of the *bona fide* place of performance.[3] In usury cases this rule was not without considerations to support it, since the usury act of the place of contracting might be said not to forbid payment of a high rate of interest in another State. The rule was, however, extended to cover all cases where the sufficiency of consideration was in question,[4] and is commonly stated to be that the *lex loci solutionis* determines the sufficiency of the consideration, unless the parties evidently intended the *lex loci contractus* to govern. This rule has been very widely followed in the State courts.

A third view, and the true one, is however held in some jurisdictions of the highest authority; namely, that all questions of consideration are to be determined exclusively by the *lex loci contractus*.[5] In view of this conflict among the authorities, it seems not improper to insist upon the rule which is unquestionably in accordance with principle.

It remains to consider the authorities upon the interpretation of contracts, the nature of the rights acquired, and matter pertaining to performance, discharge, and breach. On these points there appears to be agreement among all the authorities, the rules suggested above as founded on principle being followed. Thus the interpretation of a contract depends (as to the law governing it, that is, as to the legal meaning of the language) on the intention of the parties;[6] questions as to the legal effect of acts done under

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[1] Page 212.

[2] Page 207.

[3] Junction R. R. *v.* Ashland Bank, 12 Wall. 226.

[4] Pritchard *v.* Norton, 106 U. S. 124.

[5] Akers *v.* Demond, 103 Mass. 318; Staples *v.* Nott, 128 N. Y. 403, 28 N. E. Rep. 515.

[6] Lord Watson, in Hamlyn *v.* Talisker Distillery, [1894] A. C. 202, 212; Chatenay *v.* Brazilian S. T. Co., [1891] 1 Q. B. 79.

the contract depend on the law of the place where they are done,[1] as for instance questions as to the effect upon the title of an attempted assignment of the obligation;[2] questions as to the nature rather than the existence of the obligation depend usually on the place of performance of it;[3] questions of due performance depend on the law of the place of performance;[4] questions of discharge or postponement of the obligation depend upon the same law;[5] and so does the amount of damages recoverable on breach of the obligation.[6]

In view of these authorities it would seem possible to insist in the case of foreign contracts upon the fundamental principles so clearly stated by Professor Dicey, and to dissent from his particular rules.

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[1] First Nat. Bank *v.* Hall, 150 Pa. 466, 24 Atl. Rep. 665; Marvin Safe Co. *v.* Norton, 48 N. J. L. 410; Thurman *v.* Kyle, 71 Ga. 628; Vancleef *v.* Therasson, 3 Pick. 12.

[2] Williams *v.* Colonial Bank, 38 Ch. D. 388; Lee *v.* Abdy, 17 Q. B. D. 309; Hallgarten *v.* Oldham, 135 Mass. 1.

[3] Cox *v.* U. S., 6 Pet. 172; Hamlyn *v.* Talisker Distillery, [1894] A. C. 202. Questions as to negotiability or not are governed by the *lex loci contractus:* Ory *v.* Winter, 16 Mart. 277; Baxter Nat. Bank *v.* Talbot, 154 Mass. 213, 28 N. E. Rep. 163.

[4] Rothschild *v.* Currie, 1 Q. B. 43; Bowen *v.* Newell, 13 N. Y. 290; Brown v. Jones, 125 Ind. 375.

[5] Burrows *v.* Jemino, 2 Stra. 733; Rouquette v. Overmann, L. R. 10 Q. B. 525.

[6] Gibbs *v.* Fremont, 9 Ex. 25; *Ex parte* Heidelback, 2 Low. 526; Fanning *v.* Gonsequa, 17 Johns. 511. *Contra* in Mass. as to interest: Barringer *v.* King, 5 Gray, 9.